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Turner Broadcasting System, Inc. v. Federal Communications Commission, 910 F. Supp. 724 (D.C. 1995)

Ari B. Good

CASE SUMMARIES

Turner Broadcasting System, Inc. v. Federal Communications Commission,

910 F. SUPP. 724 (D.C. 1995).

INTRODUCTION

The District Court for the District of Columbia, on remand from the Supreme Court of the United States,[1] decided whether it was reasonable for Congress to infer that the economic viability of the over-the-air broadcast industry was in serious jeopardy absent the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992[2] (the "Cable Act"). The "must-carry" provisions require certain cable television operators to carry commercial and noncommercial over-the-air broadcast television channels without charge. In granting summary judgment for the defendants, the district court concluded that Congress had drawn a reasonable inference, based upon substantial evidence, that the "must-carry" provisions were necessary to prevent the demise of television broadcasting, and furthermore, these provisions did not violate the First Amendment.[3]

FACTS

In 1994, Turner Broadcasting System, Inc. and various cable television system operators and programmers ("Plaintiffs") challenged the constitutionality of the "must-carry" provisions of the Cable Act.[4] Plaintiffs argued that strict scrutiny should apply to government regulations that singled out cable operators and programmers and mandated carriage of broadcast television stations based on the content of the broadcasters' speech.[5] Even if the provisions were facially neutral, plaintiffs argued that the "must-carry" provisions were not sufficiently narrowly tailored to effectuate a compelling government interest.[6]

The United States Supreme Court rejected plaintiffs' arguments and applied

1. Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n, 114 S. Ct. 2445 (1994).
2. 47 U.S.C. § 534 et. seq. (Supp. IV 1988).
3. *See* Turner Broadcasting Sys. v. Federal Communications Comm'n, 910 F. Supp. 734 (D.C. 1995)(A three judge panel rendered this decision. Judge Stanley Sporkin delivered the opinion of the court, Judge Penfield Jackson concurred in the judgment, and Judge Stephen F. Williams dissented).
4. *Turner Broadcasting*, 114 S. Ct. at 2454-55.
5. *Id.* at 2465-68.
6. *Id.*

intermediate scrutiny to the "must-carry" provisions.[7] The Court reasoned that while the provisions singled out the cable industry for special treatment, mandatory carriage of broadcast television stations was based on the medium used for the transmission of video signals, rather than the content of the regulated speech.[8] To pass intermediate scrutiny, the "must-carry" provisions had to be narrowly tailored to effectuate an important government interest.[9] The Court held that Congress had important government interests in (1) preserving the benefits of free, over-the-air local broadcast television; (2) promoting the widespread dissemination of information; and (3) promoting fair competition in the market for television programming.[10]

In support of this finding, the Supreme Court examined the congressional record from the three years of legislative hearings that preceded the enactment of the Cable Act.[11] Congress received testimony concerning the effect of cable television on the economic viability of broadcast television and determined that the increasing concentration of economic power by the cable industry over broadcast television justified the "must-carry" provisions.[12]

Further, Congress found that cable operators had economic incentives to drop broadcast channels from carriage on cable television networks for several reasons. First, the physical connection between the cable and television sets provided cable operators with "bottleneck" monopoly control over the type and source of video signals available to households that subscribed to cable television.[13] Second, increasing vertical integration between cable operators and affiliated cable programmers, who provided material to the operators, offered cable companies undue market power over broadcast television.[14]

Because the cable industry increasingly relied upon advertising revenues for its profitability, broadcast channels unaffiliated with cable operators were in direct competition with affiliated cable programmers for advertising dollars.[15] Cable operators thus had an economic incentive to drop broadcast channels from carriage or to reposition them in the numerical order of cable channels transmitted to the cable subscriber.[16] Without access to the viewing audience, Congress

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7. *Id.* at 2469 (quoting United States v. O'Brien, 391 U.S. 367 (1968)).

8. *Id.* at 2459-60.

9. *Id.* at 2469.

10. *See id.* at 2469; Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n, 910 F. Supp. 734 (D.C. 1995).

11. *Turner Broadcasting*, 114 S. Ct. at 2454-55.

12. *Id.*

13. Because the cable operator had control over which channels were received by the cable subscriber, and because cable subscribers typically did not maintain antennas for the reception of over-the-air channels, broadcast channels dropped by the cable operator would not be seen by cable subscribers. *See id.* at 2454, 2466.

14. *Id.* at 2454.

15. *Id.*

16. *Id.* at 2454-55; *See also* Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n, 910 F. Supp. 734 (D.C. 1995)(placing a broadcast television station in a higher numbered position than that channel occupied when broadcast over-the-air was determined to be "disadvantageous" because viewers were less likely to watch higher numbered channels).

concluded "that the economic viability of free local broadcast television and its ability to originate quality local programming [would] be seriously jeopardized."[17]

The Supreme Court required that the "must-carry" provisions be narrowly tailored to achieve the government's important purposes.[18] The Court remanded the case to the district court for further development of the factual record regarding the level of actual harm to the continued viability of broadcast television, as well as the extent of the burdens that the "must-carry" provisions placed on cable operators' speech.[19] The Supreme Court required that the district court's findings demonstrate that the "must-carry" provisions, in fact, advanced the government's legitimate interests.[20] The district court was instructed not to review the evidence presented to Congress de novo, but to accord substantial deference to the predictive judgments of Congress.[21] The district court was required to determine whether Congress had drawn a reasonable inference based upon substantial evidence that the "must-carry" provisions were necessary to guarantee the continued viability of the broadcast television industry.[22]

Sections Four and Five of the Cable Act require "cable operators to carry the signals of a specified number of local broadcast television stations."[23] Section Four requires carriage of "local commercial television stations" that operate within the same market as the cable television system.[24] Cable systems with twelve channels or more and 300 or more subscribers are required to set aside a third of their channels for commercial broadcast stations.[25] Cable systems with twelve or fewer channels are required to carry three commercial broadcast stations.[26]

Broadcast signals carried under these provisions are required to be transmitted on a continuous, uninterrupted basis,[27] and to be placed in the same numerical position as when broadcast over the air.[28] With few exceptions, a cable operator is not permitted to charge broadcasters a fee for carrying the signals, as required by the "must-carry" provisions.[29] Section Five of the Cable Act imposes similar requirements regarding carriage of local public broadcast television stations.[30]

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17. *Turner Broadcasting*, 114 S. Ct. at 2455 (quoting 47 U.S.C. § 521(a)(16) (Supp. IV 1988)).
18. *Id.* at 2469.
19. *Id.* at 2470-72.
20. *Id.* at 2470.
21. *Id.* at 2471.
22. *Id.* at 2470-72.
23. *Id.* at 2453.
24. 47 U.S.C. § 534(b)(1)(B), (h)(1)(A) (Supp. IV 1988).
25. 47 U.S.C. § 534(b)(1)(B).
26. 47 U.S.C. § 534(b)(1)(A).
27. 47 U.S.C. § 534(b)(3).
28. 47 U.S.C. § 534(b)(6).
29. 47 U.S.C. § 534(b)(10).
30. *See* Turner Broadcasting Sys. v. Federal Communications Comm'n, 114 S. Ct. 2445, 2454 (1994); 47 U.S.C. §535(a).

LEGAL ANALYSIS

On remand before a three judge panel, the District Court for the District of Columbia addressed whether the "must-carry" provisions survived intermediate scrutiny. Under intermediate scrutiny, a content-neutral regulation will survive a First Amendment challenge if: (1) it serves an important government interest; (2) the governmental interest is unrelated to suppression of free expression; and (3) the incidental restriction on alleged First Amendment freedoms is no greater than is necessary to further the governmental interest.[31] Writing for court, Judge Sporkin found that imminent harm to the broadcast industry, posed by the increasing economic power of cable television, was likely in the absence of the "must-carry" provisions. The protection afforded local broadcast television by the "must-carry" provisions served an important governmental interest. Second, the court found that the "must-carry" provisions were unrelated to the suppression of free expression. Finally, in the district court's opinion, the burdens placed upon the cable television industry by the "must-carry" provisions were incidental, in light of cable television's technological advantages and its market position with respect to over-the-air broadcasters.

The parties filed cross-motions for summary judgment. The parties contested whether significant numbers of broadcast stations would be dropped from cable systems in the absence of the "must-carry" provisions and whether broadcast stations dropped from carriage would deteriorate or fail altogether. Nevertheless, the district court determined that a "battle of the experts" did not preclude summary judgment. The court concluded that Congress could have drawn reasonable inferences from the extensive hearings and testimony that the "must-carry" provisions were necessary to protect the viability of the broadcast industry and that the regulations did not burden more speech than necessary.

The court concluded that the economic power of the cable industry supported Congress' determination that broadcast television was threatened. First, direct competition between broadcasters and cable operators provided an incentive for cable operators to drop broadcast stations from their transmissions. Once a household subscribed, the cable company had monopoly power over the viewer's receipt of video signals because of the physical connection between the cable and the television set.[32] The cable companies faced virtually no competition because the vast majority of television communities were served by only one cable system.

Further, the court found that the cable operators had an incentive to deny carriage to broadcast stations because of the increased competition for advertising revenues. Because maximum cable subscriber rates were regulated, cable television operators looked towards advertising revenue as a source of profits.

31. United States v. O'Brien, 391 U.S. 367, 377 (1968).

32. *See* Turner Broadcasting Sys., Inc. v. Federal Communications Comm'n, 910 F. Supp. 734 (D.C. 1995)(The evidence showed that 64% of American households receiving video signals over their televisions were cable subscribers and that cable's market share was expected to increase in coming years.).

Broadcast stations' economic viability similarly depended upon that station's ability to carry advertisers' messages to a large viewing audience. Competing for finite advertising revenues, cable operators had an economic incentive to drop broadcast stations from carriage in favor of those programmers which were partially owned by the cable operators. Therefore, unaffiliated broadcast stations risked losing access to their viewing audience in favor of vertically-integrated cable television programmers.

The evidence supported the conclusion that broadcast television stations would, in fact, be dropped from carriage on cable networks and, thus, suffer economic harm. A 1988 Federal Communications Commission report, offered by plaintiffs, stated that cable operators had already dropped, refused to carry, or adversely repositioned significant numbers of local broadcasters. Similarly, a 1987 Association of America's Public Television Stations study showed seventy-four cases where public television stations were dropped from carriage. Moreover, there was evidence that the cable industry had been on "good behavior" while congressional hearings were pending and that the number of broadcast stations that would have been dropped from carriage would have been greater in the absence of the industry's self-restraint. The district court held that the government had met its burden of showing substantial evidence that the economic health of local broadcast was in genuine jeopardy and in need of the protection offered by the "must-carry" provisions.

The district court recognized that to pass the narrow tailoring requirement under intermediate First Amendment scrutiny, the regulation must not burden more speech than necessary to further the government's legitimate interests. The court examined the harm to the cable industry as a result of the "must-carry" provisions. The court's conclusion that the "must-carry" provisions were narrowly tailored to achieve Congress' purposes was based on: (1) the minimal extent to which cable operators were forced to make changes in current or anticipated programming because of the "must-carry" provisions; (2) the small number of cable programmers dropped in order to accommodate broadcast stations requesting carriage; and (3) the extent to which cable operators were able to satisfy the requirements of the "must-carry" provisions by devoting previously unused channel capacity to broadcast stations. The court held that the "must-carry" provisions, therefore, did not burden more speech than was necessary to further Congress' legitimate purposes.

The court found that the technological capability of cable broadcast systems to carry numerous channels and the market position enjoyed by the cable industry demonstrated that the burdens placed on the cable industry by the "must-carry" provisions were not substantial. Use of fiber optic cable to carry the signals enabled cable operators to support between 100 and 200 channels. The court noted plaintiffs' expert's opinion that there were 11,628 cable systems throughout the United States, each with an average capacity of forty-three channels, totaling over 500,000 cable channels nationwide. The broadcast stations granting carriage pursuant to the "must-carry" provisions thus represented 1.2 percent of the capacity of the cable television industry. Furthermore, cable operators, required to set aside channels for broadcast stations under the "must-carry" provisions, devoted previously unused channel capacity for carriage of the local broadcast stations in eighty-seven percent of the cases.

Finally, the court rejected plaintiffs' examples of other means which would achieve the government's purposes while placing a lesser burden on cable operators' speech. The evidence demonstrated that alternative technology which would permit television viewers to switch between cable and broadcast signals was unsatisfactory to viewers. The potential for other forms of regulation of the cable industry, including antitrust legislation or direct subsidies to broadcasters did not demonstrate that the "must-carry" provisions were not narrowly tailored to achieve the government's purposes. Thus, because the "must-carry" provisions satisfied intermediate scrutiny, the district court concluded that the provisions did not violate the First Amendment rights of cable operators and granted summary judgment to the defendants.

The two other judges issued opinions in the case. Judge Jackson concurred in the decision, arguing that development of the factual record required a full trial on the merits of the case. While he was willing to accept the premise that evidence for Congress' position was substantial, the extensive post-remand discovery record demonstrated that the issue could not be resolved in the summary judgment phase. He, nevertheless, granted substantial deference to Congress' findings that the "must-carry" provisions were essential to the continued viability of the broadcast industry.

Judge Williams dissented on several grounds. He argued that there was no threat to the continued viability of the broadcast television industry, either at the time of decision or imminently. Thus, because the evidence put forth by the defendants in support of their claim was rebutted by plaintiffs' evidence, summary judgment was precluded. Furthermore, because households subscribing to cable television were not cut off from broadcast television, and because fair competition could be ensured through regulatory legislation, the "must-carry" provisions constituted unwarranted forced speech by the government upon cable operators.

Second, in his dissent, Judge Williams argued that summary judgment should have been granted to the plaintiffs on their claims because the "must-carry" provisions were not narrowly tailored to effectuate legitimate government interests. He argued that forced carriage of broadcast channels was a tangible burden on cable operators' speech for several reasons. First, the availability of programs far exceeded the cable industry's current carrying capacity. Second, the court failed to consider the harm to cable programmers which are dropped to accommodate broadcast stations. Third, cable operators accommodating broadcast stations were required to add channel capacity at a cost, creating an economic burden on the cable operator.

CONCLUSION

On remand from the Supreme Court, the District Court for the District of Columbia held that Congress' determination, that the "must-carry" provisions of the Cable Act were necessary to protect the broadcast television industry from serious economic jeopardy, was based upon substantial evidence. The court held that the evidence demonstrated that the broadcast industry faced the possibility of imminent harm absent the "must-carry" provisions. Applying intermediate First Amendment scrutiny, the court found that the provisions were narrowly tailored to achieve important government purposes and, thus, did not violate the First Amendment rights of cable operators.

Ari B. Good